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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID A. HAMMOND, et al., on his own behalf and on behalf of all individuals similarly situated,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND TRANS WORLD AIRLINES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Seventh Circuit correct when it repudiated the tripartite standard established by this Court in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), that a union breaches its duty of fair representation when its actions are "arbitrary, discriminatory or in bad faith," and replaced it with a single, universal minimum rationality standard by which all union conduct must be measured?

2. In a merger of two airlines whose pilots are represented by the same union, is it a breach of the duty of fair representation for the union to:

a) refuse to implement the merger policy duly enacted in accordance with the union's democratic processes and made mandatory in such mergers?

b) intentionally discriminate against the smaller, politically weaker of two of its subunits when a merger requires their consolidation?

c) act in the manner described above because the larger unit threatens to secede from the union if it is not allowed to dictate the terms of the consolidation?

d) secretly conspire with the employer to have the employer use illegal economic pressure against the smaller, politically weaker subunit in order to force it to accept a consolidation of the seniority lists of the two subunits in the manner preferred by the larger subunit?

3. If a union acted for mixed motives, is it automatically absolved of any violation of the duty of fair representation if any one of its motives was proper?

PARTIES TO THE PROCEEDING

Petitioners David A. Hammond, *et al.*, were plaintiffs in the district court and appellants in the Court of Appeals for the Seventh Circuit. The plaintiffs in this case consist of two certified classes, defined to include:

> All persons who were members of the Air Line Pilots Association and employees or former employees of Ozark Airlines, and who are listed on the combined seniority list of Ozark and TWA pilots that is part of Exhibit H to the Second Amended Complaint.

and

> All persons who are not members of the Air Line Pilots Association, but who were employed by Ozark Airlines, and who are listed on the combined seniority list of Ozark and TWA pilots that is part of Exhibit H to the Second Amended Complaint.

A list of all of the pilots in the two classes is included on pages 90-101 of the separate Appendix.

Respondents Air Line Pilots Association, International and Trans World Airlines, Inc. were defendants in the district court and appellees in the Court of Appeals for the Seventh Circuit.

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OPINIONS AND JUDGMENT BELOW

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered December 28, 1992, reported at 981 F.2d 1524, and are set forth at pages A1-25 of the Appendix. The Order denying the petitions for rehearing and the suggestions of rehearing in banc, along with the Opinion of the judges dissenting from the denial of rehearing in banc (App. 26-34) is reported at 989 F.2d 944. The Opinion of the United States District Court for the Northern District of Illinois (App. 40-54) is reported at 141 LRRM 2063.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit were entered on December 28, 1992. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was filed on January 11, 1993 and denied by an Order entered on April 6, 1993. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioners, former pilots for Ozark Airlines, Inc. (Ozark), filed this class action against their union, the Air Line Pilots Association, International (ALPA), and Trans World Airlines, Inc. (TWA), the company that acquired Ozark in 1986. For many years, ALPA has had a comprehensive merger policy governing the integration of seniority lists in mergers where, as here, it represents the pilots of two (or more) merging airlines. A copy of the merger policy is included at pages 57 to 89 of the Appendix to this Petition. The policy was duly adopted by ALPA's democratically elected representatives and binds all ALPA members. It establishes a framework within which the pilot groups are directed to negotiate with one another, with the help of a professional mediator if necessary, concerning the way in which the two seniority lists will be consolidated as a result of the merger. The policy's linchpins are the binding arbitration it compels when the pilot groups cannot agree how to merge the lists (Merger Policy, §G1, App. 68), and the requirement that ALPA "use all

means at its disposal to compel the company to recognize the merged seniority list. . ." (*Id.*, §N4, App. 75). Because of the wide range of differences that inevitably exist between the two merging pilot groups in terms of their size, the age and length of service of their pilots, and the routes and equipment they fly, it typically is very difficult for them to reach a voluntary agreement on the matter. The prospect of mandatory arbitration, binding on both pilot groups and the union, is therefore indispensable to the effectiveness of the policy, because without it there is neither "pressure on anybody really to seek agreement" (Watt Tr. at 191) nor a mechanism for resolving differences if they don't.*

In this case, after studying the results of past arbitrations, the TWA pilots concluded that an arbitrator almost certainly would not give them what they wanted—an integration by date of hire at the premerger airlines (Pl. Stmt. of Facts, ¶30). The desire for such an integration was not based on a principled conviction that it was the "fair" or the "right" way to integrate the lists, but on the TWA pilots' judgment that it provided them with the greatest possible benefit in a merger with the Ozark pilots (Saaks Tr., Vol. II, at 75-76). However, their research disclosed that in a half century of airline mergers, no arbitrator appointed pursuant to ALPA Merger Policy had *ever* integrated lists in this fashion (Pl. Stmt. of Facts, ¶30).

Instead of trying through proper democratic channels to get ALPA to change its merger policy, or setting out to convince an arbitrator that date of hire integration was

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* Unless otherwise indicated, all record citations are to the materials submitted by the parties in connection with the summary judgment motions filed by ALPA and TWA.

appropriate in this case, the TWA pilots threatened ALPA President Hank Duffy that they would secede from the union unless ALPA ignored the merger policy and let them dictate the terms of the integration (App. 5). The Ozark pilots in turn demanded that ALPA adhere to the letter of the merger policy (Sec. Am. Cplt., Ex. C). Duffy capitulated to the TWA pilots' threat and declined to implement the policy on the date he was required to do so (Pl. Stmt. of Facts, ¶73). Later, he met secretly with Angelo Marchione, Chairman of the TWA MEC (ALPA's subordinate body at TWA), and promised him that ALPA would allow the TWA pilots to control the seniority integration (Marchione Tr. at 295, 298; Pl. Ex. 24 at 15, #3).

Next, the TWA pilots clandestinely met with TWA and jointly developed a scheme to force the Ozark pilots to accept a date of hire integration, even though TWA had no business reason for doing so other than a naked desire to benefit the TWA pilots at the expense of the Ozark pilots as a *quid pro quo* for contract concessions it received from the TWA pilots, and even though, as discussed below, TWA unilaterally imposed those same concessions on the Ozark pilots (Pl. Stmt. of Facts, ¶¶58-61, 86-87; O'Toole Tr. at 424-25; Hoar Tr. at 138-39). First, TWA lied to the Department of Transportation (which was considering whether to give its required approval of the merger) and the Ozark pilots, saying it had no definite plans to integrate the operations of the two airlines, and that there was therefore no pressing need for the pilot groups to resolve their dispute over the seniority integration (Pl. Stmt. of Facts, ¶¶47-52). The DOT expressly relied on these representations in declining to impose labor protective provisions as a condition of its approval of the merger (Pl. Ex. 276 at 16-18). Eleven days after the DOT approved the merger, TWA informed the Ozark pilots of a decision it had made and communicated to the

TWA pilots two months earlier—that it in fact intended to integrate the two airlines as quickly as possible (Pl. Stmt. of Facts, ¶¶51, 100, 106). TWA then joined ALPA officials in pressuring the Ozark pilots to facilitate this process by immediately agreeing to a date of hire integration (Hoar Tr. at 135-37; Pl. Ex. 273, ¶1). TWA turned up the pressure by unilaterally abrogating the Ozark/ALPA collective bargaining agreement and placing the Ozark pilots under the TWA/ALPA collective bargaining agreement, in violation of the *status quo* provisions of the Railway Labor Act, 45 U.S.C. §156 (Pl. Stmt. of Facts, ¶182). Finally, at the urging of the TWA pilots, TWA furloughed 86 Ozark pilots and threatened to furlough all the rest of them if they did not capitulate to the TWA pilots' demand for a date of hire integration (*Id.*, ¶¶192-97, 233-37).

At about this time, over three months after it was obligated to do so, ALPA purported to implement its merger policy, effective upon a declaration of Duffy, who waited three more weeks before issuing this declaration (Pl. Stmt. of Facts, ¶¶215-17). By then it was far too late. With 86 pilots already furloughed and TWA's threat to furlough the rest hanging over their heads, the knowledge that ALPA had abandoned them and that further resistance was pointless in view of the secret deals among ALPA, the TWA pilots and TWA, the remaining Ozark pilots caved in and voted to accept the merger documents put together by TWA and its pilots (*Id.*, ¶¶233-37). Everyone who testified on the subject agreed that ALPA's purported last minute initiation of its merger policy had no effect on the outcome of the merger (*Id.*, ¶245).

The result of the seniority integration process was a disaster for the Ozark pilots. As noted, 86 of their 556 were furloughed. No TWA pilot was furloughed. One hundred twelve of 298 Ozark captains were demoted to first

officer. No TWA pilot was demoted. All TWA pilots were immediately permitted to bid to fly all of Ozark's airplanes. The Ozark pilots in many cases have to wait decades before flying TWA planes. And the Ozark pilots were largely consigned to the bottom of the combined seniority list, where they are much more vulnerable to furloughs, and given, at least initially, much less contractual protection against furloughs than the TWA pilots had. The TWA pilots' own assessment was that they "got 99% of the marbles" in the merger (Pl. Ex. 140 at p. 2).

In Count I of their complaint brought pursuant to the Railway Labor Act, 45 U.S.C. §§151, *et seq.*, and 28 U.S.C. §§1331 and 1337, the Ozark pilots alleged that ALPA had breached its duty of fair representation and that its conduct was arbitrary, discriminatory and in bad faith. They said it was arbitrary for ALPA to refuse to apply its binding merger policy; that unions are barred from discriminating against the smaller, politically weaker of their subunits in a merger; and that ALPA acted in bad faith: (1) by capitulating to the TWA pilots' threat to leave the union if ALPA didn't allow them to control the seniority integration; (2) because Duffy acted in part to further his own bid for reelection as president of ALPA; and (3) because Duffy and other ALPA officials repeatedly lied to the Ozark pilots, stringing them along with false promises of support until it was too late for them to help themselves. Count I also charged TWA with participating in and facilitating ALPA's breach of its duty.

Count II charged TWA and ALPA with breaching the "wraparound agreement," a contract among ALPA, TWA and Carl Icahn (who had recently acquired TWA) which, petitioners contended, committed TWA to a seniority integration in accordance with ALPA's merger policy, and which ALPA could have, but did not, used to keep the

two airlines separate and to force TWA to deal fairly with the two pilot groups. Count III charged ALPA with violations of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§401, *et seq.* Counts IV and V challenged TWA's unilateral abrogation of the Ozark/ALPA collective bargaining agreement and its violation of the *status quo* provisions of the Railway Labor Act, 45 U.S.C. §156.

The district court certified two classes, one covering the 549 former Ozark pilots who were members of ALPA and the other covering the seven who were not. Following extensive discovery, both defendants moved for summary judgment. The motions were lengthy and complex, as each party attempted to support its position with voluminous documentation. Twenty months after the motions were filed, the district court granted them in their entirety in a one sentence order (App. 35). After confirming that the court did not intend to issue an opinion explaining its ruling, plaintiffs appealed and the Seventh Circuit remanded the case with directions that the district court do so (App. 36-37). The same day, the district court *sua sponte* issued a ten sentence order outlining "[f]or the guidance of the parties," an "explanation of the most significant of its reasons for granting the motions for summary judgment. . ." (App. 38-39). The order provided that it was "not an exhaustive statement of all of the reasons for granting those motions" and that "[a]dditional reasons for the court's ruling may be found in the arguments of defendants in their memoranda in support of their motions for summary judgment." *Id.* Following the remand from the court of appeals, the district court wrote a longer opinion. *Hammond v. Air Line Pilots Ass'n.*, 141 LRRM 2063 (N.D. Ill. 1991).

Plaintiffs again appealed and, while the case was pending in the court of appeals, TWA filed a Chapter 11 Bank-

ruptcy Petition. On February 13, 1992, the United States Bankruptcy Court for the District of Delaware lifted the automatic stay to allow the appeal to proceed and to permit the filing and disposition of this Petition for Writ of Certiorari (App. 55-56).

The Seventh Circuit affirmed in a decision which it *sua sponte* decided to issue in two cases that had been litigated and argued separately. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (C.A. 7 1992). In the part of its decision addressing the *Rakestraw* case, the court reversed a district court judgment that ALPA had breached its duty of fair representation. (The *Rakestraw* plaintiffs have already filed a Petition for Writ of Certiorari, which is currently pending. No. 92-1798.)

The court of appeals began by noting that it would "simplify the facts. Details are irrelevant on the view we take of the union's obligations." (App. 3). The court then got some of the facts wrong, and slanted others against petitioners, even though all inferences should have been drawn in their favor on summary judgment. It disparaged the Ozark pilots' proposal to integrate the seniority list using a ratio method as a "demand for protection" (App. 4), while giving the TWA pilots implicit credit for being "willing to dovetail the seniority lists, giving each pilot seniority from the date hired by either airline" (*id.*), even though ratio integrations, unlike date of hire integrations, are common in the airline industry. Moreover, the Ozark pilots were ready, even eager, to submit their so-called "demand" to the binding decision of a neutral arbitrator, while the TWA pilots categorically refused to arbitrate their mere "willingness" for date of hire. The court suggested that the merger documents were fair because both pilot groups got protective "cells" (App. 5), but the cells actually demonstrate the opposite. The Ozark pilots' pro-

tective cells only let some of them keep their captain's seats for an extra couple of years before they had to give them up to TWA pilots. The TWA pilots got no such cells because they didn't need them; not one of them was displaced by an Ozark pilot. The TWA pilots' protective cells, on the other hand, severely limit, sometimes for decades, the right of the Ozark pilots to fly TWA's airplanes. The TWA pilots, by contrast, got immediate and total access to Ozark's planes.

Turning to the law, the court of appeals, in a remarkably candid repudiation of this Court's precedents, concluded that the "arbitrary, discriminatory, or in bad faith" standard established in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and recently reaffirmed in *ALPA v. O'Neill*, 499 U.S. ____, 111 S. Ct. 1127 (1991), was a set of mere "empty" "buzzwords" (App. 15). In the view of the court of appeals, "[t]hese terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis." (App. 11). The court then collapsed *Vaca*'s tripartite standard into a straightforward minimum rationality test imported from cases arising under the Equal Protection Clause of the Fourteenth Amendment. This extraordinarily deferential standard, the court concluded, is the only one by which a union's conduct should ever be measured, although it acknowledged that under this reformulated standard, short of "shoot[ing] strikebreakers," there is little a union is prohibited from doing (App. 16).

Applying its new standard to this case, the court observed that "[a] rational person *could* conclude that dovetailing seniority lists in a merger, treating service at either firm as of equal weight, without quotas or other preferences for either group of employees, serves the interests of labor as a whole." (App. 16, emphasis supplied).

Declining to evaluate or endorse ALPA's contention that it had provided the Ozark pilots with the "essential equivalent" of its merger policy, the court euphemistically characterized the union's failure to follow the policy as permissible "experimentation" (App. 17). The court summarily rejected petitioners' claim that ALPA had acted improperly by favoring the TWA pilots: "If the union's leaders took account of the fact that the workers at the larger firm preferred [a date of hire integration], so what? Majority rule is the norm." (App. 16). It found irrelevant the secret deals among ALPA, the TWA pilots and TWA; Duffy's efforts to advance his reelection prospects by manipulating the merger policy; and his capitulation to the TWA pilots' threat to leave ALPA if the union did not allow them to control the merger.

Both the plaintiffs in this case and the plaintiffs in *Rakestraw* petitioned for rehearing with a suggestion for rehearing in banc. On April 6, 1993, both of those petitions were denied over the objection of two judges who dissented from the denial of rehearing in banc. *Rakestraw v. United Airlines, Inc.*, 989 F.2d 944. The dissenting judges pointed out that "[t]he panel opinion deviates from the standard that the Supreme Court has established for [duty of fair representation] cases." (App. 27). "By not employing the tripartite standard," the dissenters observed, "the panel has deviated from the established law of the Supreme Court and the Seventh Circuit, and it has placed this circuit in conflict with other circuits." (*Id.*, 31-32). The court did so, the dissenters protested, notwithstanding that "this circuit has already been criticized by the Supreme Court [in *O'Neill*] for its crabbed interpretation of the duty of fair representation." (*Id.*, 32, n.2).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S REPUDIATION OF THE *VACA* TEST HAS CREATED TWO SEPARATE CONFLICTS IN THE CIRCUITS.

Over twenty-five years ago, this Court held that a union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). In *ALPA v. O'Neill*, 499 U.S. ____, 111 S.Ct. 1127, 1134 (1991), after acknowledging that "there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation," the Court specifically and unanimously reaffirmed the *Vaca* standard, and also confirmed that it is truly a tripartite one; that is, that its three components are distinct and that a union's conduct may be measured against any or all of them. 111 S.Ct. at 1132-35.

The court of appeals frankly repudiated *Vaca*'s tripartite standard as a collection of "empty" "buzzwords." (App. 16) In its view, "[t]hese terms are not self-defining. They are conclusions—epithets rather than standards of conduct or tools of analysis." (App. 11). But the court of appeals did more than just disparage the three components of the test. As the judges dissenting from denial of rehearing in banc observed (App. 31), the court "boil[ed] down" the tripartite standard into "a single rationality test" imported from cases arising under the Equal Protection Clause of the Fourteenth Amendment. While this Court did refer to the equal protection cases in *O'Neill* (111 S.Ct. at 1134), it did so only in the context of analyzing whether ALPA's conduct in that case could be char-

acterized as arbitrary. In *Abrams v. Communications Workers*, ____ F.Supp. ____, 143 LRRM 2341 (D.D.C. 1993), the court similarly held that union conduct need only be measured against *O'Neill*'s "wide range of reasonableness" standard.

Other circuits have recognized that the *Vaca* test is tripartite and have applied it in that manner. In *Carter v. Local No. 789*, 963 F.2d 1078, 1082 (C.A. 8 1992), for example, the Eighth Circuit reversed a decision in which:

> the district court held that the union's conduct, as a whole, passed the *ALPA* "wide range of reasonableness" test. In so holding, however, the district court blurred the distinction between the "arbitrary" and "discriminatory" prongs of the *ALPA* test. The "wide range of reasonableness" standard applies only to allegedly *arbitrary* union conduct (emphasis in original).

Since this Court decided *O'Neill*, several other circuits have similarly recognized that "[e]ach of [the] three components of the *Vaca* standard imposes on the union a separate requirement." *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1326 (C.A. 6 1992). *See also, Colon Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, 940 (C.A. 1 1992) (stating test in disjunctive); *Jones v. Union Pacific R. Co.*, 968 F.2d 937, 941 (C.A. 9 1992) (same).

In *Aguinaga v. United Food and Commercial Workers International Union*, ____ F.2d ____, 143 LRRM 2400 (C.A. 10 1993), the court first set forth *Vaca*'s tripartite standard, then noted that it was obligated to affirm the jury verdict in favor of the plaintiffs "if the evidence supports a finding that the Union acted in *any one* of these three ways. . ." *Id.* at 2404 (emphasis supplied). Unlike the Seventh Circuit here, the Tenth Circuit rejected the

union's argument that "*O'Neill* counsels that the Union be accorded due deference in its decision to sacrifice Plaintiffs' rights," and held that "such deference would only be appropriate insofar as the Union's motive had been proper. . ." *Id.* at 2405.

Indeed, in *O'Neill* itself, while it concluded that ALPA's actions had been rational and therefore not arbitrary, this Court specifically left open the issue of whether ALPA had acted in bad faith. 111 S.Ct. at 1133, n.6. On remand, the Fifth Circuit addressed that issue independent of any claim that ALPA's actions were arbitrary or discriminatory. *O'Neill v. ALPA*, 939 F.2d 1199 (C.A. 5 1991). In yet another recent case involving ALPA, a district court rejected "the premise that the 'arbitrary, discriminatory, or in bad faith' standard enunciated by the Supreme Court in 1967, *Vaca*, 386 U.S. at 190, 87 S.Ct. at 916, and since cited by innumerable courts as a tripartite test, is actually a bipartite 'arbitrary or in bad faith' standard." *Nellis v. ALPA*, 815 F.Supp. 1522, 1533 (E.D. Va. 1993). Thus, as the dissenting judges concluded, the lower court's reformulation of the *Vaca* standard into a single, and universal, minimum rationality test, deviated substantially from the established law of this Court and created a conflict in the circuits.

The Seventh Circuit created a second conflict in the circuits when it applied its reformulated duty of fair representation standard to this case. As noted above, the court assumed for purposes of its opinion that ALPA had not followed its binding merger policy in this case (App. 17), but nevertheless concluded that it had not breached its duty of fair representation. Two other courts have evaluated claims that ALPA breached its duty of fair representation by failing to adhere to the terms of its merger policy and reached the opposite conclusion. In *Ber-*

nard v. ALPA, 873 F.2d 213 (C.A. 9 1989), a case the court below studiously ignored, the Ninth Circuit held that ALPA's failure to adhere to the policy was, by definition, a breach of its duty of fair representation. Unlike the court below, the Ninth Circuit recognized that ALPA's elected representatives made application of the policy mandatory, and the arbitration it compels binding, precisely because they recognized that the union's leadership could not be trusted to exercise its judgment fairly and impartially when confronted with the "difficult task of balancing not just divergent, but polarized, interests" of two union groups. 873 F.2d at 217. In a very recent decision, another court similarly concluded that it would be a breach of its duty of fair representation for ALPA to fail to follow its merger policy (although it determined that ALPA had in fact adhered to the policy in that case). *Nellis v. ALPA*, 815 F.Supp. 1522, 1533 (E.D. Va. 1993). These decisions cannot be reconciled with the decision of the court below that ALPA did not breach its duty of fair representation when it refused to follow its merger policy in this case.

Both of these conflicts arise from fundamental differences among the lower courts with respect to the proper standard for evaluating duty of fair representation cases. The Court should grant the Petition to resolve these important questions regarding the scope of the central protection available to union members against malfeasance by their union.

II.

ALPA BREACHED ITS DUTY OF FAIR REPRESENTATION IN THIS CASE.

The need to resolve the two conflicts in the circuits created by the lower court's decision is not the only

reason the Court should grant this Petition. This case also presents important and recurring issues concerning the scope of each of the three prongs of *Vaca*'s tripartite duty of fair representation standard. With respect to the arbitrariness component, it presents the issue of when, if at all, union leaders can exercise their discretion to deny certain members rights previously guaranteed them by the union through democratic means. The duty of fair representation has always been oriented toward protecting the rights of minorities within the union, and this case presents the issue of when, if at all, a union can discriminate against electoral and political minorities within the union in a merger that requires the consolidation of two previously independent union subunits. It presents claims of bad faith conduct premised on the union's capitulation to threats by one union subunit to secede from the union if it is not allowed to run roughshod over a smaller subunit in a merger of the two, coupled with the union president's desire to advance his own reelection prospects. And it presents the issue of the extent of the employer's liability for secretly cooperating with the union by agreeing to provide the illegal muscle necessary to force the smaller union subunit to capitulate.

A. A union acts arbitrarily when it refuses to comply with the binding dictates of a democratically enacted union policy.

The terms of ALPA Merger Policy bind every member of the union, as ALPA's president and general counsel both conceded (Pl. Ex. 303 at 3; Duffy Tr. at 14; Pl. Ex. 267, ¶8). The policy is just as binding as the union's constitution and bylaws. *Id.* The court of appeals assumed for the sake of argument that ALPA did not follow that

policy here, and erred by declining to find that failure arbitrary within the meaning of *Vaca*.

This Court has recognized the fundamental importance of the promises to the membership contained in a union's constitution and bylaws and other similarly binding declarations of union policy. *Wooddell v. Intern. Broth. of Elec. Workers*, 502 U.S. ____, 112 S.Ct. 494 (1991). The rights contained in such documents provide important safeguards to members who find themselves in electoral or political minorities within the union, and the denial of such fundamental written guarantees is inherently arbitrary.

Thus, in *Adams v. Nagle*, 303 U.S. 532, 543 (1938), this Court held that it would be arbitrary "for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action. . ." In *Steelworkers v. Rawson*, 495 U.S. 362, 372-75 (1990), the Court similarly suggested that it would be a breach of the duty of fair representation for a union to breach duties clearly imposed on it by a collective bargaining agreement. While the promises at issue here are contained in an internal union document, nothing in this Court's analysis in *Rawson* suggests that this difference is significant. The merger policy more than satisfies *Rawson*'s requirement that the document in question clearly give the members rights against the union. *See*, App. 57-89.

Other lower courts have frequently held that violations of the constitution, bylaws or other similarly binding union policies establish a breach of the duty of fair representation. Indeed, as noted above, two courts have so held with respect to the very merger policy at issue here. *Bernard v. ALPA*, 873 F.2d 213 (C.A. 9 1989); *Nellis v. ALPA*,

815 F.Supp. 1522 (E.D. Va. 1993). As the *Nellis* court put it:

> No reported decision has fully come to grips with the competing concerns implicated in protecting the rights of minorities within a union. While the test for impermissible discrimination must be broader than merely arbitrary or bad faith conduct, it cannot be so broad that it unduly disrupts the functioning of democratic decision-making within the union. With these competing concerns in mind, this Court adopts the following proposition: while a union is free to establish its internal policies on the basis of majority rule, the union is not free to ignore properly enacted and promulgated policies whenever such a course is convenient or beneficial to the majority of the union's membership. In other words, a union is bound to follow its official policies unless and until they are amended by means approved under the union's constitution. 815 F.Supp. at 1533.

Many other circuits have also held that a union breaches its duty of fair representation when it intentionally deprives its members of rights guaranteed them by the union constitution, *Ass'n of Contracting Plumbers v. Local Union No. 2*, 841 F.2d 461, 468-69 (C.A. 2 1988); *Alexander v. Intern. U. of Operating Eng., AFL-CIO*, 624 F.2d 1235, 1241 (C.A. 5 1980); *Denver Stereotypers & Electrotypers U. v. NLRB*, 623 F.2d 134, 136-37 (C.A. 10 1980); *Intern. Bro. of Teamsters, Chauffeurs v. NLRB*, 587 F.2d 1176, 1182 (D.C. Cir. 1978); *Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747, 758-61 (C.A. 3 1977); *Trail v. International Broth. of Teamsters, Etc.*, 542 F.2d 961, 968 (C.A. 6 1976), or by a collective bargaining agreement. *Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2404-05 (C.A. 10 1993); *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1438 (C.A. 7 1992).

The court below excused ALPA's departure from its merger policy by noting that the terms of the policy "did not become frozen in 1986, all modification taboo" (App. 17). Here, however, there is no dispute that the merger policy was not actually amended by ALPA's democratically elected representatives and, in context, it is clear that the court of appeals' reference to "modification" meant that ALPA President Duffy was entitled to unilaterally disregard the policy whenever he thought the best interests of the union required it: "Perhaps Duffy was wrong, but a mistake in judgment does not violate the duty of fair representation" (App. 18). This ignores the fact that neither the merger policy nor the union's constitution and bylaws gave ALPA's president discretion to make such judgments. Thus, this is not a case in which the Court must decide how much deference to give a union's good faith interpretation of an ambiguously phrased policy. The court of appeals simply held that all union decisions are entitled to a generalized, and virtually complete, deference. But whatever deference the courts ought to give the judgments of union leaders who are authorized to make them, or who are interpreting an ambiguous policy in good faith, the deference should be much less, if it is given at all, to union leaders who exercise their discretion in bad faith to dispense with the binding mandate of a union policy.

The court of appeals also defended its deference to Duffy's decision to excuse the TWA pilots from the dictates of merger policy on the ground that they were more numerous than the Ozark pilots and that ALPA was therefore entitled to favor their interests (App. 16). But this overlooks the fact that the TWA pilots are not the majority of *ALPA* and the whole point of the merger policy, as the Ninth Circuit recognized in *Bernard* is that the

union's membership made a collective decision to deny its elected leaders the right to exercise this kind of discretion in merger situations. Few, if any, ALPA members can be sure they will not one day find themselves on the minority end of a merger, and it was their collective judgment not to entrust to ALPA's officers the "difficult task of balancing not just divergent, but polarized, interests" when two seniority lists must be merged. 873 F.2d at 217. It is that decision, made to insulate the union's leadership from precisely the kinds of threats to which they succumbed here, that is entitled to judicial deference, not, as the court of appeals believed, the union leadership's decision to "experiment" in defiance of the command of the membership.

Finally, the court of appeals defended its conclusion that ALPA's actions were not arbitrary by pointing to the rationality it perceived in the merger documents themselves (App. 16). The TWA pilots' accurate assessment that they "got 99% of the marbles" in the merger casts considerable doubt on whether the documents are even minimally fair. But even assuming that there was some barely minimal rationality in the documents, this should not have ended the inquiry. In *O'Neill*, this Court held that:

> the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. at 338, 73 S.Ct., at 686, that it is wholly "irrational" or "arbitrary." 111 S.Ct. at 1136.

By the same token where, as here, there is much other evidence of the union's breach of its duty, a minimally rational agreement should not be conclusive evidence, standing alone, that the duty has not been breached.

B. A union acts discriminatorily when it purposefully sacrifices the interests of the smaller, politically weaker of its two bargaining units in a merger.

The basic premise of ALPA's merger policy, as the courts recognized in *Bernard* and *Nellis*, is that mergers place unions in a uniquely difficult position. Rather than negotiating with management to obtain additional benefits for its members, the union must allocate a fixed number of benefits between two union groups. While unions frequently have to decide how they prefer to allocate among their members the benefits management is willing to confer, mergers involve much greater intraunion conflict than do other situations. Layoffs, early retirements, additional hiring and the like may add or subtract names to one end of the seniority list or the other, but mergers involve a rearrangement of two (or more) entire lists. More important, while management is vitally concerned with hirings or layoffs that affect the total number of employees that must be compensated, unless additional training costs are involved, it usually is relatively indifferent to the allocation of a finite number of positions on a list. The employees, on the other hand, care desperately about that allocation. The union consequently finds itself caught in the middle of what is essentially an internal struggle over the allocation of a finite number of benefits between two previously separate and independent groups within the union. Particularly in businesses like the airline industry, which has a long history of mergers and consolidations, the duty of fair representation provides an important safeguard to protect the interest of political and electoral minorities within the union in such situations.

Thus, this Court has suggested that it would be a breach of the duty of fair representation for the union to unfairly discriminate against one of its units when two

of them are involved in a merger, *Humphrey v. Moore*, 375 U.S. 335, 343 (1964), although it found on the facts of that case that the union had acted properly. *See also*, *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). The lower courts have frequently held that unions breach their duty of fair representation in merger situations when they sacrifice the interests of a smaller, politically weaker group in order to placate a more politically powerful segment of the union, *see, e.g.*, *Air Wisconsin Pilots Protection Com. v. Sanderson*, 909 F.2d 213, 217 (C.A. 7 1990), when they favor existing employees over newcomers in a merger of two union groups, *see, e.g.*, *Beardsley v. Chicago & North Western Transp. Co.*, 850 F.2d 1255, 1268-69 (C.A. 8 1988), or when they cut a secret deal with the employer without the knowledge or consent of the disadvantaged unit within the union. *Id.*; *Volkman v. United Transp. Union*, 724 F.Supp. 1282, 1329-31 (D. Kan. 1989). ALPA did all of these things here, and its discrimination against the Ozark pilots is rooted in its failure to follow its merger policy.

The court of appeals observed, correctly, that the differences between the two pilot groups made it unlikely that they would voluntarily have agreed on a way to merge the seniority lists (App. 4), but flew badly off course with its further observation that ALPA's merger policy "did not seem likely, under the circumstances, to produce agreement within the union either." (*Id.*, 17-18). That, of course, is the policy's *raison d'être*! The policy's provision for mandatory binding arbitration, and its requirement that the union adopt the arbitrator's award as its position in its negotiations with management, provide a mechanism for establishing the union's position when it cannot be reached by agreement of the pilot groups involved. Absent such provisions, the larger pilot group would always exercise

its superior power within the union to enforce its will on the seniority integration process.

While the employing airline is not ordinarily bound by the union's merger policy, the wraparound agreement gave ALPA that leverage here. Moreover, the merger policy commits the union to fight for the seniority list produced by the policy, and there is considerable evidence in the record that here, as in most mergers, TWA would have treated the two pilot groups equally if ALPA had insisted that it do so (Pl. Stmt. of Facts, ¶¶122, 125-26, 140, 159-77). Instead, ALPA declined to either enforce the wraparound agreement or implement its merger policy, then it allowed the TWA pilots to work fist-in-glove with TWA to force the Ozark pilots to accept a date of hire integration.

This is precisely the kind of discrimination in the integration of the seniority lists that both the merger policy and the duty of fair representation were designed to prevent. As the dissenting judges below pointed out, the duty "was created to protect minority interests," and numerous decisions have interpreted it in that spirit, but the decision in this case "disregards all of this by deferring so heavily to majority interests." (App. 31).

C. A union acts in bad faith when it acts to further the electoral prospects of its officers, or capitulates to bad faith threats made by a union subunit, or conspires with the employer to disadvantage another union subunit.

The breadth of the impact of the court of appeals' collapse of the tripartite *Vaca* standard is most clearly evidenced by its complete emasculation of the bad faith prong of the standard. Bad faith has been the touchstone of numerous claimed breaches of the duty of fair representation both in this Court, *Hines v. Anchor Motor Freight*,

424 U.S. 554, 559-60 and n.4 (1976); *Vaca v. Sipes*, 386 U.S. 171, 193-95 (1967), and in the lower courts. *See, e.g., Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2404-05 (C.A. 10 1993); *O'Neill v. ALPA*, 939 F.2d 1199 (C.A. 5 1991). Moreover, "bad faith" is hardly an "empty buzzword" devoid of content; the courts have frequently and comfortably interpreted that phrase not just in the context of the duty of fair representation, but in many others as well. *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. ____, 111 S.Ct. 2123 (1991).

Because it was able to articulate a minimally rational basis for ALPA's actions, however, and because its reformulation of the *Vaca* standard requires no more, the court of appeals never had to come to grips with the significance of the bad faith factors which motivated ALPA here. Thus, the court of appeals acknowledged but disregarded the fact that Duffy declined to implement the merger policy only after the TWA pilots threatened to secede from ALPA if he did so (App. 5). It ignored the considerable evidence in the record that Duffy acted as he did to further his own reelection prospects (Pl. Stmt. of Facts, ¶¶80-82). It ignored the clandestine deals in which ALPA agreed to allow the TWA pilots to dictate the merger of the seniority lists and TWA agreed to lay off almost 20% of the Ozark pilots and threaten to lay off the rest of them if they did not accede to the TWA pilots' demand for a date of hire seniority integration.

The lower court's exceptionally deferential standard enabled it to conclude that all of these improper motives were irrelevant in light of Duffy's paternalistic "judgment" that, notwithstanding their repeated and vigorous demands for the implementation of ALPA's merger policy, the interests of the Ozark pilots were best served by

allowing him to "experiment" with it. There is not even a need, the court of appeals held, for a factual determination of what role (if any) this motive actually played in ALPA's decisionmaking, and it was therefore able to resolve this case without a remand for findings of fact. All of this deference is necessary, the court of appeals believed, in order to maintain the delicate balance of power between labor and management: "To say that the union acts in 'bad faith' or 'discriminatorily' when it attempts to shore up the solidarity of labor by eliminating the distinctions managers try to introduce is to curb an important tool by invoking a slogan." (App. 16). The irony, of course, is that the court then proceeded to sanction just the opposite—a covert deal between management and one of two subunits of the union to benefit that subunit at the expense of the other.

Moreover, as the *Rakestraw* petitioners correctly pointed out in their Petition for a Writ of Certiorari (at pp. 18-19), the decisions of this Court in other contexts have repeatedly rejected the view that a single permissible motive trumps two or three or even a dozen impermissible ones. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55 (1989); *Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985). In *Hunter*, this Court noted that under the Equal Protection Clause of the Fourteenth Amendment, a showing that an impermissible motive was a "substantial" or "motivating" factor behind a law obligates its defenders to prove that it would have been enacted anyway. 471 U.S. at 228. The Seventh Circuit, which purported to transfer the rationale of these cases wholesale to the duty of fair representation context, applied no such analysis here nor, had it done so, could it have sanctioned ALPA's conduct on summary judgment.

But this Court's decisions suggest that the standard should be even *higher* in duty of fair representation cases. It has characterized the union's duty as requiring "*complete* good faith and honesty of purpose in the exercise of its discretion," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (emphasis supplied), and likened it "to the duty owed by other fiduciaries to their beneficiaries." *O'Neill*, 111 S.Ct. at 1134. Fiduciaries, in Justice Cardozo's famous phrase, are held to "the punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) and, as this Court has observed, "[a] fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' " *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981), quoting *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 269. See also, *Aguinaga v. United Food and Commercial Workers International Union*, 143 LRRM 2400, 2405 (C.A. 10 1993).

The issue of the proper standard for evaluating and weighing improper union motives in duty of fair representation cases is an important one which this Court ought to resolve.

III.

TWA'S LIABILITY AND THE OTHER COUNTS OF PETITIONERS' COMPLAINT.

Similar to United's role in *Rakestraw* (see Rakestraw Petition for Certiorari at 8, n.4), petitioners here sued TWA for participating in and facilitating ALPA's breach of its duty of fair representation, and because TWA's presence is necessary to "insure complete and meaningful relief." *Glover v. St. Louis-San Francisco Ry.*, 393 U.S.

324, 329 (1969). As the *Rakestraw* petitioners correctly point out, the court of appeals' suggestion that an employer has a virtually absolute right to use economic pressure, even when it does so to facilitate the union's breach of its duty of fair representation, conflicts with this Court's decision in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569-70 (1976). See also, *Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747, 759 (C.A. 3 1977); *Jones v. TWA*, 495 F.2d 790, 798 (C.A. 2 1974). Indeed, it is in cases like this one involving a covert conspiracy between a large union subunit and the employer to force a smaller subunit to accept the larger subunit's terms, that the need for the protection afforded by the duty of fair representation is most acute.

The court of appeals' conclusion that ALPA did not breach its duty of fair representation meant it never had to reach the question of TWA's liability for participating in and facilitating that breach. That conclusion, along with its observation that TWA had an absolute right to use economic pressure, also led the court to hold that the Ozark pilots' vote ratifying the merger documents was an absolute bar to the other claims raised in their complaint. It is, of course, a fundamental principle that unlawful duress, if it is sufficient to overcome an individual's free will, vitiates actions taken while under the duress, *see, e.g., Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67 (1918), and TWA's violations of both its contractual obligations to the Ozark pilots and the *status quo* provisions of the Railway Labor Act clearly qualify as unlawful. The lower court erred in granting TWA an unlimited license to exercise even illegal economic pressure. In petitioners' view, therefore, here, as in *Rakestraw*, should certiorari be granted and the judgment reversed, the issue of TWA's liability should be remanded for fur-

ther consideration. In this case, such a remand would include the question of whether TWA's actions constituted illegal duress sufficient to invalidate the Ozark pilots' vote and therefore justify the entry of judgment against them on their other claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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